

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Amendment of the Commission's  
Rules to Preempt State and Local  
Regulation of Tower Siting For  
Commercial Mobile Service Providers

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RM - 8577

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To: The Commission

REPLY COMMENTS IN SUPPORT  
OF ISSUANCE OF  
NOTICE OF PROPOSED RULEMAKING

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Dated: March 6, 1995

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## **I. INTRODUCTION**

Bay Area Cellular Telephone Company ("BACTC"), on its own behalf and on behalf of its affiliates, Napa Cellular Telephone Company ("Napa"), Salinas Cellular Telephone Company ("Salinas") and Cagal Cellular Communications Corporation ("Cagal"), hereby files reply comments in support of the "Cellular Telephone Industry Association's Petition for Rule Making" ("CTIA's Petition") in the above captioned proceeding. BACTC and its affiliates are the nonwireline cellular carriers licensed by the Federal Communications Commission ("FCC") and certificated by the California Public Utilities Commission ("CPUC") to provide facilities-based cellular service in the San Francisco-San Jose, Salinas-Seaside-Monterey, Fairfield-Napa-Vallejo, and Santa Rosa, California Cellular Geographic Statistical Areas ("CGSAs"). BACTC and its affiliates are controlled indirectly by AirTouch Communications, Inc. and McCaw Cellular Communications, Inc.

BACTC and its affiliates support CTIA's Petition because local and state zoning regulations and practices in California are impeding BACTC's ability to construct and modify cellular facilities to meet its customers' needs. In particular, some jurisdictions have gone so far as to adopt moratoriums prohibiting the construction of any cellular facilities. Other jurisdictions have simply made it extremely difficult and time consuming to construct cellular facilities. If BACTC and its affiliates are to comply with their FCC and CPUC obligations to provide high quality reliable cellular service, these companies must be able to efficiently and expeditiously build and modify cell sites in all jurisdictions in their service territories. The FCC should initiate a rulemaking proceeding to determine what steps, including preemption of local and state zoning regulations, should be taken to ensure that cellular carriers are able to efficiently serve the public.

A number of interested parties that filed comments on February 17, 1995, opposed the CTIA's Petition and asserted that the state and local governmental agencies having jurisdiction over the siting of cellular facilities have been "effective and progressive." See generally Comments of Attorney General of Connecticut. Carroll County, Maryland similarly avers that local authority over cell siting should not be preempted absent "overwhelming evidence that the states and local jurisdictions are unnecessarily obstructing construction of the commercial mobile radio service infrastructure.... We do not believe this is the case in Carroll County, Maryland and feel that all of our zoning actions with respect to mobile carriers have been reasonable and justified." See letter response dated February 17, 1995. Though BACTC and its affiliates have been able to resolve most differences with local jurisdictions, not all localities are as reasonable as Connecticut and Carroll County believe themselves to be.

## **II. DISCUSSION**

### **A. A Number of Jurisdictions Have Placed a Moratorium on the Construction of Communications Facilities in their Jurisdictions.**

BACTC and its affiliates have made extraordinary efforts to work with local and state agencies on the siting of cellular facilities. In spite of these efforts, a number of jurisdictions in BACTC's and its affiliates' service areas have recently adopted outright moratoria on the construction of any type of communications facilities in all or significant portions of their service areas. At least two local counties and one city have enacted ordinances that establish long term (up to two years) moratoria on applications for use permits for commercial radio, telephone, or other communication and transmission antenna or tower in various residential zones (including low density, mid-density, high density, rural and agricultural

residential zones). The moratoria have been established purportedly to ensure that antennas and towers are sited in a manner that promotes efficient use of land resources, achieves aesthetic and other community values, prevents safety and health hazards, externalities, and incompatibility between land uses when located in close proximity to residential uses and complies with the provisions of the general plan and zoning ordinance. However, they effectively preclude the carriers from constructing any new facilities or undertaking significant modification of existing facilities throughout a significant portion of the service area.

The obvious impact of these moratoria is that there are now large portions of BACTC's and its affiliates' service territories where the carriers cannot expand their cellular system. More than any other state or local action, these outright bans on the construction or improvement of cellular facilities debilitate the cellular carriers' ability to provide cellular coverage and should be the subject of discussion in the proposed rulemaking proceeding. The FCC should fully consider the deleterious effect of moratoria since they dramatically interfere with the carriers' ability to provide adequate coverage and quality service.

**B. Other Jurisdictions Have Made it Very Difficult to Construct these Facilities**

Although most jurisdictions have not imposed outright prohibitions on the construction of cellular facilities, they have delayed or denied permits based on capricious application of zoning regulations or by capitulating to "NIMBY" opposition. In a number of instances the agencies have denied such applications even when the utility has gone to extraordinary lengths to work with the local communities to locate a facility in a permitted zone and to design it to be compatible with the surrounding environment. In addition some jurisdictions have imposed unreasonable conditions on permits issued for the construction of

such facilities. In the paragraphs that follow, BACTC has provided a brief description of some of these agency actions and the adverse effects which resulted therefrom.

BACTC's experience with one of its East Bay cell sites is illustrative of the difficulties in permitting cellular facilities. In March 1991, BACTC filed an application for a conditional use permit to construct a cell site in an East Bay city. In order to minimize the impact of its cellular facility, BACTC proposed to locate its cell site in a zone which permitted public utility uses<sup>1</sup> and to limit its cellular facility to a 195-square foot cellular equipment shelter with attached antennas. BACTC designed the shelter to match existing adjacent residential structures. Neighborhood concerns regarding aesthetics, EMF and a commercial venture being allowed in a residential area, along with the City's unwillingness to recognize BACTC as a public utility, led to the denial of the use permit application. In response to these concerns, BACTC hired outside counsel to establish its status as a public utility. BACTC also attempted to address the alleged adverse aesthetic impacts of its facility by eliminating the 195-square foot shelter and proposing instead to use an existing garage as its equipment room, with the antennas on the roof of the garage. Despite BACTC's best efforts to respond to local concerns, the City Council ultimately denied even this revised project. As a result BACTC was ultimately forced to locate its cell site at a technically less desirable location in an adjacent city, thereby providing less than optimal cellular coverage.

BACTC's experience in a North Bay city was similar. Cagal filed an application with the affected county for a use permit to construct a cellular facility in a rural/residential zone in which public utility uses are permitted. Cagal proposed to locate its 130-foot antenna tower

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<sup>1</sup> In California, cellular carriers are regulated as public utilities, pursuant to California Public Utilities Code § 201 et seq.

in a grove of eucalyptus trees that effectively concealed the site. Neighbors opposed the sites because of potential EMF impacts, aesthetic concerns and other environmental factors. Despite receiving the support of planning commission staff, the site was ultimately denied by the Board of Supervisors.

BACTC also encountered substantial resistance and delay in its attempt to place a cell site in a South Bay city. In order to provide reliable cellular service in a major highway corridor in Santa Clara county, BACTC sought to locate a cellular facility on surplus property of a public high school near the bus maintenance depot. The city twice denied BACTC's applications for the Conditional Use permit ("CUP") for a 60-foot monopole. BACTC appealed the denials, but the City Council denied the appeal. BACTC then applied to the neighboring city for permission to construct an alternate site. BACTC was denied local permits there as well. In order to satisfy both jurisdictions, BACTC considered at least 24 other alternative sites within the target area, pursuing all those that might have been feasible up to the point at which infeasibility became apparent. In addition, at the request of the first city, BACTC considered 5 alternate sites outside the target area. BACTC was forced to seek CPUC preemption authority in order to construct its proposed site. From the date that the need for the facility was established, BACTC spent 14 months before the city unsuccessfully applying for local permits and another ten months pursuing its application for preemption before the CPUC.

Even in those instances in which a local agency ultimately issues a permit for a facility, the agencies' lack of understanding of the public benefits of quality cellular service or of cellular engineering requirements, its unfamiliarity with its own permitting requirements, lack of resources and lengthy procedures often result in considerable delay in the permitting of

cellular facilities. It is rare for BACTC or its affiliates to obtain use permits for its cell sites in less than six months and a number of cell sites have taken over two years to permit.

In some counties, the extent and nature of the public hearing process and requests for supporting data add substantially to the length of time it takes to obtain a permit. For example, in April of 1993, BACTC applied for a CUP for a cell site in a rural area of the North Bay. The proposed project would be located atop a local mountain and consisted of the addition of three antennas to an existing communications facility. Despite the fact that twelve other wireless communications facilities already were operating at the site, BACTC's proposed cell site faced considerable public opposition. The affected county held four separate hearings on the BACTC proposal and ultimately required BACTC to prepare or pay for three EMF studies, all of which concluded that BACTC's facility posed no health risk.<sup>2</sup>

BACTC's facility was ultimately approved by the county with, among others, two significant conditions: (1) BACTC was prohibited from installing and operating more than eight channels at the site; and (2) BACTC must submit EMF studies to the county every six months. Despite the extensive county procedures for reviewing and analyzing the impact of the site, local residents have sued the county and BACTC alleging that the county's studies of the EMF impacts were not sufficient.

In some instances local agencies have imposed costly and unreasonable conditions on permits which sometimes impede BACTC's ability to provide efficient cellular service to the

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<sup>2</sup> The first EMF study was unacceptable to the county because it was prepared by a BACTC employee. In accordance with the county's direction BACTC hired an outside consultant to do a second study. The county then decided that the second study was unacceptable since the consultant was hired by BACTC. The county ordered its staff to hire an EMF consultant at BACTC's expense to undertake a third study. At the same time BACTC attempted to obtain its building permit for the site and was told such a permit would not be released until BACTC provided yet another study to be used as a baseline for the subsequent six month studies.

public. As discussed above, jurisdictions have limited the number of channels at a cell site. Other jurisdictions have required BACTC and its affiliates to pay for improvements to the property as a condition of a permit.

### **III. CONCLUSION**

When BACTC began constructing its cellular system in 1986 it was dramatically easier to permit and construct cell sites. BACTC only had a limited number of sites which served relatively large areas. As a result, BACTC had considerable flexibility in choosing its cell site locations and had a number of existing towers and tall buildings from which to choose. If it had to construct a tower, it would locate it in an area zoned for commercial or industrial use. If a particular jurisdiction was opposed to its facility, BACTC simply moved its facility to a neighboring jurisdiction with more accommodating zoning regulations.

Today, however, cell siting requirements are much different. Currently BACTC and its affiliates have 235 cell sites throughout the Bay Area. On average each of these sites serves only 40 square miles (20 square miles within the more densely populated urban areas): some sites in the downtown areas serve only two square miles. In order to meet system engineering requirements, the target area or "search ring" for new cell sites has become more restrictive. In order to properly serve the public, BACTC and its affiliates cannot be restricted to placing sites in limited areas but must have the option of constructing sites in all areas, including residential or rural areas. Accordingly, if BACTC and its affiliates are to continue to expand and maintain the system to keep up with demand for increased coverage and improved quality, they must have the ability to construct cell sites in all jurisdictions without being subjected to unreasonable conditions, delays, and denials.

#### IV. REQUEST FOR RELIEF

BACTC and its affiliates are committed to continuing to work with localities to locate cell sites in the most harmonious and unintrusive fashion possible. They are also committed to working with the California Public Utilities Commission to this end, and are in fact currently participating in CPUC-sponsored workshops to try to resolve some of the problems leading to disputes and delays. It is hoped that the difficulties referenced by BACTC above are expeditiously resolved in this forum. However, BACTC and its affiliates do respectfully request that the FCC issue a Notice of Proposed Rule Making to further examine the difficulties faced by cellular carriers and the possible remedy of federal preemption of local zoning and other regulations imposed upon CMRS provider tower sites.

Dated: March 6, 1995

Respectfully submitted,

BAY AREA CELLULAR TELEPHONE  
COMPANY  
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By \_\_\_\_\_

  
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**CERTIFICATE OF SERVICE**

I, Catherine M. Seymour, a secretary in the law firm of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 6th day of March 1995, sent by First Class U.S. Mail copies of the foregoing "REPLY COMMENTS IN SUPPORT OF ISSUANCE OF NOTICE OF PROPOSED RULEMAKING" to the following:

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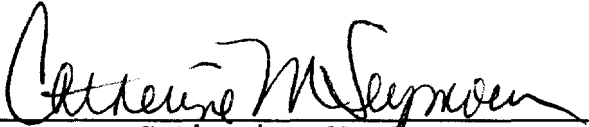
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